No. 08-367

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ISLANDER EAST PIPELINE COMPANY, L.L.C.,
Petitioner,

v.

GINA MCCARTHY, COMMISSIONER OF THE STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,

and

STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, THE AMERICAN GAS ASSOCIATION, THE NATURAL GAS SUPPLY ASSOCIATION, THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND THE NORTHEAST GAS ASSOCIATION

KEVIN B. BELFORD
ANDREW SOTO
AMERICAN GAS ASSOCIATION
400 N. Capitol St., NW
Washington, D.C. 20001
(202) 824-7070

DONALD F. SANTA
JOAN DRESKIN
TIMM ABENDROTH *
DAN REGAN
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
10 G Street, NE
Suite 700
Washington, DC 20002
(202) 216-5912

* Counsel of Record

Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

R. SKIP HORVATH
PATRICIA JAGTIANI
NATURAL GAS SUPPLY ASSOCIATION
805 15th Street, NW
Suite 510
Washington, D.C. 20005
(202) 326-9300

BARRY RUSSELL
INDEPENDENT PETROLEUM ASSOCIATION
OF AMERICA
1201 15th Street, NW
Suite 300
Washington, D.C. 20005
(202) 857-4722

THOMAS M. KILEY
NORTHEAST GAS ASSOCIATION
75 Second Avenue
Suite 510
Needham, MA 02494
(781) 455-6800

Counsel for Amici Curiae

QUESTIONS PRESENTED

In *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U. S. 700, 722 (1994), the Court reserved the question whether a state water quality certification under section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, can stand if it conflicts with a licensing decision of the Federal Energy Regulatory Commission (FERC). The issue in *PUD No. 1* was hypothetical because FERC had not yet acted. This case presents an actual conflict: FERC licensed Petitioner's proposed pipeline under the Natural Gas Act (NGA), subject to construction restrictions addressed to impacts on the sea floor and shellfish, but Respondent Connecticut Department of Environmental Protection (CTDEP) effectively vetoed the project by denying Petitioner's application for a clean water certificate under CWA § 401(a) based on the same impacts addressed by FERC. A divided panel of the Second Circuit, exercising jurisdiction under a 2005 amendment to § 19 of the NGA authorizing federal courts of appeals to remand state CWA permitting actions (inter alia) that are "inconsistent with the Federal law governing such permit and [that] would prevent the construction" of an interstate pipeline, 15 U.S.C. §717r(d)(3), upheld CTDEP's decision.

The questions presented are:

1. Whether the court below erred in applying the "inconsistent with the Federal law" standard under NGA § 19(d) without addressing the substantive CWA issue reserved by this Court in *PUD No. 1*, *viz.*, whether a state can veto a FERC-licensed project through a CWA § 401 determination that conflicts with the FERC license.

2. Whether the court below erred in failing to address the question whether CTDEP's denial of a CWA § 401 certificate, based on seafloor and shell fishing impacts rather than on water quality, is "inconsistent with Federal law," within the meaning of NGA § 19(d) and CWA § 401(a); and

3. Whether a state may withhold water quality certification under CWA § 401(a) based on impacts to an industry, or to the seafloor, in the absence of a showing that a "discharge" from the construction activity results in an impact on water quality.

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INTEREST OF *AMICI CURIAE* [1]

The Interstate Natural Gas Association of America (INGAA), the American Gas Association (AGA), the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than INGAA, AGA, NGSA, or IPAA made a monetary contribution to the preparation or submission of this brief.

Natural Gas Supply Association (NGSA) and the Independent Petroleum Association of America (IPAA) submit this brief *amici curiae* in support of the petition pursuant to the Court's Rule 37. Petitioner and Respondent consent to the filing.

Amici are trade associations that represent all major sectors of the domestic natural gas industry, from producers at the wellhead (NGSA, IPAA), through interstate pipelines (INGAA) to retail distribution companies (AGA) that deliver gas to consumers at the burnertip. INGAA represents the interstate natural gas pipeline industry in North America, including virtually all of the interstate pipelines operating in the United States, including Petitioner. INGAA's members transport over 95 percent of the nation's natural gas through a network of over 200,000 miles of pipelines. INGAA pipelines are subject to regulation by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act (NGA), 15 U.S.C. §§ 717-717w.

The AGA represents over 200 natural gas local distribution utilities located in all 50 states that deliver natural gas to 64 million customers throughout the United States. AGA members include: (1) publicly traded energy utilities, municipally owned energy utilities, and privately held utility companies and (2) natural gas distributors, pipelines, marketers and storage facilities. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for members including the filing of *amici* briefs commenting on issues that could affect its members and/or their customers.

NGSA represents U.S.-based producers and marketers of natural gas on issues that broadly affect the natural gas industry. NGSA is the voice of suppliers

who find, sell, transport and deliver approximately 30 percent of the United States' natural gas supply. Established in 1965, NGSA encourages the use of natural gas within a balanced national energy policy and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. consumers.

IPAA represents the companies that drill 90 percent of the nation's oil and natural gas wells. These companies produce 82 percent of American natural gas and 68 percent of American oil.

The Second Circuit's decision sustains Respondent CTDEP's veto of Petitioner's FERC-approved Islander East natural gas pipeline project, based on CTDEP's exercise of delegated federal authority under section 401(a) of the Clean Water Act (CWA). Congress enacted the judicial review provision under which the court acted, NGA § 19(d), 15 U.S.C. § 717r(d), to curb federal and state agencies' ability to abuse federally delegated powers under the CWA and other statutes by vetoing pipeline projects that FERC, the lead agency for reviewing interstate pipeline projects, has found to be in the national public interest. *Amici* are concerned that the court below has rendered NGA § 19(d) toothless. In deciding whether CTDEP's decision was "inconsistent with the Federal law" under 19(d), the court failed to address the question of a conflict between FERC licensing and state CWA § 401 authority reserved in *PUD No. 1*, and ultimately upheld an interpretation of the key statutory provisions, *viz.*, NGA § 19(d) and CWA § 401(a), that will permit states to veto FERC-approved pipeline projects based on environmental impacts unrelated to the CWA's focus on "discharges" that affect water

quality. Unless corrected, the Congressionally chosen mechanism for checking state agency abuse of federally delegated CWA certification powers will be largely a dead letter.

The issues raised in the petition concerning the proper interpretation of NGA § 19(d) and CWA § 401(a) are important to the natural gas industry because they have a direct impact on the ability to construct, as well as economic viability of constructing needed new interstate pipelines on which the Nation's economic growth and safety depend. In view of the Second Circuit's decision, pipeline investors will be wary of risking the substantial time and money necessary to secure FERC approval of a proposed project – which already includes substantial scrutiny of the environmental impacts – if, at the end of that federal process, one state can veto the project by denying CWA certification. More importantly, one state's veto power can, as it has done in this case, deprive another state's natural gas consumers of a useful and valuable source of competitive natural gas transportation. The decision below may well embolden states to assert parochial interests at the expense of the national interest in obtaining adequate supplies of natural gas.

INGAA's members, who are in the business of constructing new pipelines, have a direct interest insofar as they must take the added risk of a state veto into consideration in planning and proposing new projects. AGA and its members have an interest in ensuring that adequate new pipeline capacity is built to meet the health, safety, and economic needs of their customers. And NGSA and IPAA have a corresponding interest in ensuring that adequate new

pipeline capacity is built to get their natural gas to market.

INTRODUCTION

In *PUD No. 1*, this Court reserved the question whether a state water quality certification under CWA § 401 can stand if it conflicts with a licensing decision of the FERC. 511 U. S. at 722. The issue was hypothetical there because FERC had not acted, and the Court has not had another occasion to address the question.

In 2005, Congress enacted legislation that addressed the conflict identified in *PUD No. 1* in the context of FERC licensing of interstate pipelines. Section 313(b) of the Energy Policy Act of 2005 (EPACT) 119 Stat. 594, conferred original jurisdiction on the United States Courts of Appeals to review (inter alia) such federal or state agency CWA decisions. If a court of appeals finds that "such order or action is inconsistent with the Federal law governing such permit and would prevent construction . . . of the facility . . . , the Court shall remand the order to the agency to take appropriate action consistent with the order of the Court." 15 U.S.C. § 717r(d)(3). Congress did not, however, give further guidance on how the critical phrase "inconsistent with the Federal law" is to be interpreted.

The court below is the first to address the new statute. In interpreting the critical phrase "inconsistent with the Federal law governing such permit," the court concluded that it need only determine whether "CTDEP complied with the procedural dictates of the Clean Water Act in applying state water quality standards to Islander East's permit application[,]" and whether its decisionmaking passed mus-

ter under the deferential "arbitrary and capricious" standard of the Administrative Procedure Act (APA). Pet. App. 19a. After remanding the CTDEP's first denial as "arbitrary and capricious" (Pet. App. 175a), with a strong suggestion of predisposition and lack of good faith on the part of the CTDEP (218a-220a), a divided panel of the Second Circuit found that CTDEP's second denial passed muster under the APA standards.

In its decision, the court never addressed the difficult issue reserved in *PUD No. 1* as to a conflict between FERC licensing and a state's veto under CWA § 401. As Petitioner points out, this case presents an actual conflict. Pet. 4. Moreover, the court did not confront other substantive grounds for the CTDEP's decision to deny CWA certification to the project. As Petitioner argues, CTDEP relied principally on the impact that certain construction techniques would have on the seafloor and the shellfishing industry. But the court never addressed the question whether CTDEP may withhold water quality certification under CWA § 401(a) based on impacts to an industry, or to the seafloor, in the absence of a showing that a "discharge" from the construction activity results in an *impact on water quality*. The court erred in failing to address these substantive CWA issues in deciding whether CTDEP's denial was "inconsistent with the Federal law governing such permit."

Amici file this brief to emphasize the critical importance of the decision below to the natural gas industry. Congress designed new NGA § 19(d) to circumscribe abuse of federally delegated CWA authority by (inter alia) state agencies, and thereby to reduce the regulatory risk associated with the process of obtaining the necessary approvals to construct new

pipelines. The decision below undermines that goal by sanctioning improper grounds for a state to deny CWA certification, and by misreading the "inconsistent with the Federal law" provision in NGA § 19(d)(3) to give the CTDEP more deference than Congress intended.

It is important that this Court appreciate the grave consequences of this decision for building new natural gas pipeline capacity. The States' delegated permitting authority under the CWA and other Federal statutes has an impact on virtually every pipeline construction project since almost all of them involve navigable waters. The additional risk of a state veto at the end of the application process will thus add to the cost of (if not outright prevent in some cases) investment in interstate pipeline construction.

Because of the important questions concerning conflicts between FERC's NGA jurisdiction over new interstate pipeline construction, and the federal authority delegated to states to certificate such projects that involve "discharges" into navigable waters, the Court may also wish to ask the Solicitor General for the views of the United States.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant the Writ to Address Important Substantive CWA Issues Reserved in *PUD No. 1* that Are Presented by the Proper Interpretation of the "Inconsistent with Federal Law" Standard in New NGA § 19(d).

In upholding CTDEP's denial of water quality certification for the Islander East project pursuant to CWA § 401(a), 33 U.S.C. § 1341(a), the court below performed a perfunctory analysis of CTDEP's compli-

ance with the substantive requirements of that Act. A more searching inquiry would have shown CTDEP's decision to be "inconsistent with the Federal law" governing Connecticut's CWA permit, within the meaning of new NGA § 19(d).

A. The Court Below Failed to Address the Question Left Open in *PUD No. 1* Concerning a Conflict Between FERC Licensing and State CWA Certification.

1. The Clean Water Act

Among other things, the CWA is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). *See generally PUD No. 1, supra,* 511 U.S. at 704-05. The Act seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2). The CWA establishes distinct roles for the Federal and State Governments. The Environmental Protection Agency (EPA) is required, among other things, to establish effluent limitations on point sources of discharges into navigable waters. *See* §§ 1311, 1314. CWA § 303 requires each State, subject to EPA approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. *Id.* at § 1313. A state water quality standard "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *Id.* at § 1313(c)(2)(A). A 1987 amendment to § 303 requires an "antidegradation policy" providing that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation. *PUD No. 1*, 500 U.S. at 705.

Under CWA § 401(a), a party seeking to construct an interstate pipeline "which may result in any discharge into the navigable waters" must provide FERC with certification "from the State in which the discharge originates or will originate" that "any such discharge" will comply with that state's water quality standards, including those adopted under CWA § 303. 33 U.S.C.§ 1341(a). Under 401(d), 33 U.S.C. § 1341(d), a state may impose conditions on the certification of a project, including "any effluent limitations and other limitations . . . necessary to assure that any applicant" will comply with the CWA and state law requirements." *See generally PUD No. 1*, 511 U.S. at 711-713.

2. The Question Reserved in *PUD No. 1*

In *PUD No. 1*, the Court recognized a distinction between an outright denial of a CWA certificate under § 401(a) and the grant of a conditioned certificate under § 401(d). *PUD No. 1* involved a minimum flow condition imposed on a certificate granted by the state under § 401(d). While the Court there rejected the argument that a state can only impose water quality limitations that are specifically tied to a "discharge," the Court's "discharge" holding was confined to § 401(d), which "expands the State's authority to impose conditions on the certification of a project." 511 U.S at 711. The Court observed that the text of § 401(d) "refers to the compliance of the applicant, not the discharge[,]" and therefore allows "the State to impose 'other limitations' on the project" to assure compliance with the CWA and state law. *Id.* In other words:

> Section 401(a)(1) identifies the category of activities subject to certification — namely those with discharges. And § 401(d) is most reasonably read

> as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge is satisfied.

Id. at 711-12. Thus, the Court's decision was based on the phrase "other limitations" in § 401(d).[2] The Court observed, however, that "[i]f § 401 consisted solely of subsection (a), which refers to a state certification that a 'discharge' will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force." *Id.* at 711.

In *PUD No. 1,* the Court reserved the question of conflict between a FERC licensing action and a state CWA § 401 certification. The petitioners argued, inter alia, that the Court should limit the state's authority to impose water quality conditions on a hydroelectric facility because FERC has comprehensive authority to license such facilities under the Federal Power Act (FPA), 16 U.S.C. § 791a *et seq.* The Court found no such conflict in *PUD No. 1,* noting that FERC had not yet acted on the license, and that FERC might in any event agree with the state agency. 511 U.S. at 722. The Court was "unwilling to read implied limitations into § 401" because, inter

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[2] In a later case, the Court, quoting from *PUD No. 1*, 511 U.S. at 713, stated: "As we have explained before, 'state water quality standards adopted pursuant to [CWA] § 303 are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process.'" *S.D Warren Co. v. Maine Bd.*, 547 U.S. 370, 374 n.1 (2006). Given the Court's focus on the distinction between the scope of subsections 401(a) and (d) in *PUD No. 1*, it seems clear that the reference in *SD Warren* was to § 401(d) rather than 401(a).

alia, "any conflict with FERC's authority under the FPA is hypothetical[.]" *Id.* at 723.

3. The Conflict Between FERC and the CTDEP

Petitioner argues (Pet. 4) that granting the writ in this case will give this Court an opportunity to address the question reserved in *PUD No. 1* because the case presents a clear conflict between a FERC license and a state's authority to veto that license under CWA § 401. *Amici* agree. Indeed, as Petitioners explain (Pet. 23-26), before the CTDEP denied CWA certification, Connecticut litigated in full the environmental issues of concern to it before FERC and lost: FERC concluded that mitigation measures specified in its Final Environmental Impact Statement "would effectively reduce and minimize impacts on commercial fishing activities to an acceptable level" (Pet. App. 409a-410a; *see also* 435a-438a), and acknowledged long-term impacts of anchor and seabed depressions and took them into consideration when it determined that "the overall project will have limited adverse environmental impacts." (334a-336a). Connecticut voluntarily dismissed its petition for review of FERC's decision by the D.C. Circuit.

FERC's jurisdiction over the licensing of interstate pipelines under the NGA is directly analogous to its jurisdiction over hydroelectric licenses under the FPA. Under the NGA, anyone seeking to build new interstate natural gas pipeline facilities must secure "a certificate of public convenience and necessity" from FERC pursuant to NGA § 7, 15 U.S.C. § 717f(c)(1)(A). While other federal statutes apply to various aspects of pipeline construction, Congress designated FERC "as the lead agency for the purposes of coordinating all applicable Federal authori-

zations and for the purposes of complying with the National Environmental Policy Act of 1969," 15 U.S.C. § 717n(b). FERC's NEPA review typically includes (as it did in this case) a comprehensive analysis of the environmental impacts all along the proposed route of a new pipeline, including the impacts on Long Island Sound and the commercial shell fishing industry that are at the center of this controversy. *See* Pet. App. 332a-337; 406a-410a. FERC's final certificate approving the project was conditioned on Islander East following procedures to avoid or minimize adverse impacts. *See* Pet. App. 435a-438a.

4. New NGA § 19(d)

Congress enacted new NGA § 19(d) in 2005 to address just the sort of conflict that this Court identified in *PUD No. 1*. The Congress conferred "original and exclusive" jurisdiction on the courts of appeals for the circuits in which the pipeline project is proposed to review state and federal permitting in § 19(d)(1). Under § (d)(3):

> If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 3 or section 7 [15 U.S.C. § 717b or § 717f], the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court.

The legislative history indicates that Congress enacted NGA § 19(d) "because applicants, like Islander East, were encountering difficulty proceeding with natural gas projects that depended on obtaining state agency permits." Pet. App. 179a (citing Regional Energy Reliability and Security: DOE Authority to En-

ergize the Cross Sound Cable: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce, 108th Cong. 8 (2004) (Statement of Rep. Barton)). While the legislative history is sparse, the structure and text of new § 19(d) make it clear the legislation was designed to put a federal check on the delegated state (and federal) decision making that would "prevent the construction" of natural gas pipelines or unreasonably delay consideration of a permit.

Congress imposed on the courts of appeals the duties to construe the phrase "inconsistent with Federal law governing such permit." The Second Circuit should have decided the question posed in *PUD No. 1*, *viz.*, whether a FERC licensing approval is trumped by a state CWA § 401 certificate denial. It failed to do so.

5. The Court of Appeals' Misinterpretation of NGA § 19(d)

In this case, it seems clear that "the Federal law governing such permit" is the CWA as applied in light of other federal law. The court below, however, reviewed the CTDEP's compliance with the CWA perfunctorily. Under the standard articulated by the court, the court employs de novo review "to determine whether the [agency] complied with the requirements of relevant federal law," and "[i]f no illegality is uncovered during such a review," the court examines the challenged findings and conclusions "under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles." Pet. App. 18a-19a (internal quotation marks and citation omitted). Here the court "easily" concluded (Pet. App. 19a) that CTDEP complied with the CWA, and then proceeded

to apply the APA's deferential arbitrary and capricious standard to CTDEP's conclusion that the Islander East project would violate Connecticut's water quality standards.

The court's first step should have been to address the question reserved in *PUD No. 1:* whether a state can trump a FERC-approved project based on a conflicting exercise of its authority under CWA § 401. The court below stumbled, however, at that first step, which is indispensable to a meaningful application of the standard of review for state permits specified in new NGA § 19(b). This Court should grant the writ to guide the courts of appeals in addressing the conflict between FERC's lead role in certificating new interstate pipeline projects and the States' delegated authority under CWA § 401.

B. The Court Below Failed to Address the Important Question Whether a State Permissibly May Deny CWA Certification Based on Environmental Impacts Unrelated to a "Discharge" that Will Have an Impact on Clean Water.

Petitioner correctly argues that CWA § 401(a), properly interpreted, does not authorize a state agency to block interstate pipeline construction on any basis other than its impact on water or water quality under § 401(a). Pet. App. 17-23. In addition, *amici* wish to emphasize several additional points.

First, the only grounds on which the majority below upheld CTDEP's certificate denial were unrelated to a discharge affecting water quality. In its decision, the CTDEP emphasized the "exceptionally high quality water quality and habitat conditions" needed for the pertinent shellfishing (near the Thimble Is-

lands), and ultimately relied principally on impacts to the seafloor from anchor strikes and sweeps (i.e., impressions or "dents" in the seafloor that would be left by anchors as a pipe-laying barge moves across the Sound), and the use of "engineered backfill" (i.e., non-native material that would replace native material dredged to dig the pipeline trench). *See* Pet. App. 62a-63a. The CTDEP cited two additional reasons for denying Islander East a water quality certification: (a) dredging and plowing would cause sedimentation that could adversely affect shell fish habitat and (b) releases of drilling fluid would destroy at least 3.55 acres of shellfish habitat. *Id.* at 63a-64a.

Ultimately, the court found that CTDEP's certificate denial survived its deferential "arbitrary and capricious" review because there was sufficient record evidence based on the anchor impacts and backfill concerns to support CTDEP's finding that there would be a significant loss of shellfish habitat to the detriment of the industry. *See* Pet. App. 21a-38a. Importantly, the court, like the CTDEP, did not identify any "discharge" in connection with these impacts, or tie them to "water quality" per se. As to the dredging and plowing and releases of drilling fluid that would have an adverse impact on shellfish (Pet. App. 39a-45a), the court below found that evidentiary record deficiencies would call for a remand to the CTDEP if it were not for the anchor and backfill impacts on shellfish habitat that the court found were supported by the record. See Pet. App. 38a-39a. In other words, *the court below sustained CTDEP's CWA permit denial based on the findings that were not connected to any discharge that affects water quality*– findings that were irrelevant to the state CWA § 401(a) certification.

Second, the court's failure to identify a "discharge" raises another issue that should be examined under NGA § 19(d). In both of its decisions addressing the Islander East project, CTDEP denied the certificate outright under § 401(a). It did not specifically address environmental conditions that FERC imposed on the federal certificate. Nor did it choose to exercise its CWA authority to impose conditions on the project, and thus invoke its right to impose "other limitations" as provided in § 401(d). The important point is that the permissible scope of state action under § 401(d) is broader than under § 401(a) because 401(a) is limited to "discharges," whereas 401(d) allows grant of a certificate conditioned on "other limitations." *See PUD No. 1*, 511 U.S. at 711. The court of appeals here has sanctioned an interpretation of CWA § 401(a) that allows state regulation of matters that are far removed from water quality. The Court should grant the writ to ensure that CWA § 401(a) actions are properly tethered to the focus of the Act on discharges that affect water quality.

II. The Decision Below Undermines the Congressionally Chosen Remedy for Abuse of Federally Delegated CWA Certification Authority

NGA § 19(d) is the Congressionally chosen remedy for addressing conflicts between FERC's central role in licensing interstate and pipeline construction under the NGA and NEPA, on the one hand, and state and federal agencies exercising federally delegated authority under the CWA and other statutes. See discussion at 12-13. In addition to the court's perfunctory review of CTDEP's compliance with the CWA discussed in Part I, *amici* are concerned that the court's deferential application of the arbitrary

and capricious standard leaves ample room for abuse of delegated authority by state agencies.

After reviewing CTDEP's procedural compliance with the CWA (finding that it "easily" passed muster, Pet. App. 19a), the court examined the challenged CTDEP findings and conclusions "under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles." Pet. App. 18a-19a. The court's application of the APA could not overcome its misapplication of the CWA. As it now stands, the CTDEP's veto of the Islander East project will prevail on a record where the majority and dissent disagreed on an extremely close question whether *conceded* errors below were harmless, i.e., whether the CTDEP would again veto the project in a second remand on a record cleansed of error.[3]

We do not invite this Court to review factual disputes over the record before the CTDEP. The Court should grant the writ, however, to consider how the "inconsistent with Federal law" standard under new NGA § 19 (d) is to be applied to review of state water quality certification in pipeline construction cases.

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[3] In addition, it bears emphasis that a major concern of the court below was the CTDEP's good faith in its consideration of Islander East's proposal. In its first remand decision, the court strongly suggested that the denial was "foreordained," based on the brevity of the decision, and failure to adequately explain or support the denial, failure to acknowledge contrary evidence, and neglect of important aspects of the problem. *See* Pet. App. 175a; 220a. The question of CTDEP's "good faith," vel non, was still a close one following the second denial. *Compare* Pet. App. 45a-46a (majority) *with id.* at 59a-60a (dissent).

III. The Decision Below Threatens Investment in New Pipelines That Are Needed to Meet the Nation's Demand for Natural Gas.

The decision below, unless corrected, will have a chilling effect on the construction of additional natural gas pipeline infrastructure across the country that is necessary to sustain the economy and safety of residential consumers. As *amici* demonstrate below, the pace of new pipeline construction has quickened in response to the Nation's energy needs. That construction has rested on the assumption that the regulatory risk of these investments is constrained by law within reasonable bounds. The Second Circuit's decision has shattered that assumption by conferring on state environmental agencies sweeping power to veto pipeline projects. The protection of new NGA § 19(d) has been set at naught.

Petitioner's experience illustrates the problem poignantly: after obtaining New York's and FERC's go ahead, subject to environmental conditions that addressed shellfishing impacts of concern to Connecticut, the CTDEP vetoed the project. Moreover, the CTDEP's veto came after extensive litigation before FERC over the very same substantive environmental issues concerning the impacts of pipeline construction on shellfishing in Long Island Sound. See Pet. at 23-26 (discussing Connecticut's participation in FERC's NEPA proceeding prior to its own CWA review). After seven years, Islander East's substantial costs of pursuing the various federal and state permits may well be sunk.

Demand for natural gas is increasing, particularly in the power generation sector. *See, e.g.*, Energy Information Administration (EIA), Dep't of Energy, *Natural Gas Year-In-Review 2007*, at 1 (March 2008),

available at <http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2008/ngyir2007/gyir2007.pdf>; EIA, *"Natural Gas Consumption by End Use* (September 30, 2008), available at <http://tonto.eia.doe.gov/dnav/ng/ng_cons_sum_dcu_nus_a.htm)>. The EIA reports that U.S. natural gas pipeline construction activity has accelerated substantially in response to this growing demand, as well as to increasing production from new and shifting sources of supply such as shale and liquefied natural gas import terminals. *See* EIA, *Additions to Capacity on the U.S. Natural Gas Pipeline Network: 2007* (July 2008), available at <http://www.eia.doe.gov/pub/oil_gas/natural_gas/Feature_articles/2008/ngpipelinenet/ngpipelinenet.pdf>. Capacity additions to the grid totaled almost 14.9 billion cubic feet of daily deliverabilty for the 50 projects completed in 2007 – the largest in any year in EIA's 10-year database of pipeline construction activity. *Id.* at 1. Moreover, substantial additional capacity additions have been proposed in the next several years. EIA reports about 200 natural gas pipeline projects proposed for development between 2008 and 2010, accounting for over 10,100 miles of potential new natural gas pipeline. *Id.* at 14.

With NGA § 19(d) as the sole remedy for a natural gas project sponsor whose FERC-approved project has been "vetoed" on parochial and arbitrary grounds, the Court should consider the impact on future investment decisions of letting this decision stand. Other state and federal agencies may well exploit the Second Circuit's lax approach to review under NGA § 19(d). The threat of a veto at the end of the long and costly process necessary to obtain federal approval may discourage investment in the construction of critically needed gas transmission facili-

ties whenever those facilities involve construction in the waters of more than one state. Nor is the effect limited to coastal water construction projects; virtually every interstate pipeline crosses navigable water subject to State CWA § 401 certification. In short, under the Second Circuit's approach, the States' delegated permitting authority under the CWA and other federal statutes threatens virtually every pipeline construction project.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEVIN B. BELFORD
ANDREW SOTO
AMERICAN GAS ASSOCIATION
400 N. Capitol St., NW
Washington, D.C. 20001
(202) 824-7070

R. SKIP HORVATH
PATRICIA JAGTIANI
NATURAL GAS SUPPLY ASSOCIATION
805 15th Street, NW
Suite 510
Washington, D.C. 20005
(202) 326-9300

THOMAS M. KILEY
NORTHEAST GAS ASSOCIATION
75 Second Avenue
Suite 510
Needham, MA 02494
(781) 455-6800

DONALD F. SANTA
JOAN DRESKIN
TIMM ABENDROTH *
DAN REGAN
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
10 G Street, NE
Suite 700
Washington, DC 20002
(202) 216-5912

BARRY RUSSELL
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA
1201 15th Street, NW,
Suite 300
Washington, D.C. 20005
(202) 857-4722

Counsel for Amici Curiae

* Counsel of Record